CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

East'n. District. *May* 1816.

EASTERN DISTRICT, MAY TERM 1816.

LOUISIANA BANK *vs.* HAMPTON.

LOUISIANA BANK vs. *HAMPTON*, *ante* 94.

APPEAL from the court of the first district.

On the dismissal of an appeal, no mandate can issue to the inferior court to execute its judgment.

DERBIGNY, J. delivered the opinion of the court. When this case was first before us, we decided that we could not exercise our jurisdiction, for the reasons adduced in the opinion then given, and we dismissed the appeals. Since that, an application has been made by one of the parties, who complains that the judge of the first district refused to issue execution on his judgment, and he has prayed for a *mandamus* to compel him to issue it.

With a view to promote the ends of justice, we ordered a writ to issue, informing the judge, that the appeals in these cases were dismissed, and requiring him to proceed, as if no appeal

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had been granted, or shew cause why he did not. To this requisition the judge has made an answer, from which it appears that he considers this mandate as insufficient and he expects from this court some explicit order. It has therefore become unavoidable for this court now to declare, whether or not they have a right upon the dismissal of an appeal to issue any mandate to the inferior court.

Hitherto, on such occasions, a desire of facilitating the progress of suits had induced us to send to the inferior court, in the form of a mandate, an information that the appeal was dismissed, and that they could proceed as if no appeal had been claimed. It is obvious that such an information was more in the nature of an advice than in that of a command. A command supposes the authority, in the person commanding, to enforce obedience to his order. Here, if the inferior thought fit to disregard the recommendation of this court, what could be done? Could he be ordered peremptorily to execute his own judgment? No. For that judgment not being the judgment of this court, it had no control over it. This court possesses no general superintending power over the inferior courts. It could not, for example, direct other courts to proceed, in cases in which the matter

East'n. District. *May* 1816.

LOUISIANA BANK vs. HAMPTON.

in dispute is below three hundred dollars, or in suits wherein no appeal was claimed. Neither can it assume such a power in cases in which the appeal has been dismissed. For, where is the difference between a case not appealed from, and one in which the appeal has been annihilated? None certainly, as to what regards the want of authority, on the part of this court to interfere. A case, in which the appeal has been dismissed, because this court could not exercise jurisdiction over it, owing to some insufficiency or illegality in the proceedings, does not differ in this respect, from one in which the court declares that it has no jurisdiction at all. Both are as completely without its reach, as if they had never come up.

We are aware that the practice of the supreme court of the United States, in cases of this kind, is to send to the inferior court a *mandamus* directing them to proceed. But that court is by law authorised to issue writs of *mandamus* generally "in cases warranted by the principles and usages of law to any court appointed, or to persons holding offices under the authority of the United States." No power of this sort is given to this court. It cannot issue any other mandates than those which are necessary to the exercise of its appellate jurisdiction.

Disclaiming, therefore, any right to interfere any farther in suits in which the appeal is dismissed, we will henceforward forbear sending any instruction to the inferior courts as to the conduct which they are to pursue in such cases. Our sentiment on the effects of a dismissal, so far as it may influence their conduct is sufficiently made known by the recommendations, in force of mandates, which we have offered in such instances, and by the opinion we gave in the case of *Clark's Ex's* vs. *Farrar*, 3 *Martin*, 212, that the appeal does not extinguish the judgment of the inferior court: and that in cases in which the appeal is set aside, the parties are replaced in the same situation, in which they were before any appeal was claimed.

It is ordered that the conditional mandate be rescinded and annulled.

Turner for the plaintiffs. *Duncan* for the defendant.

TERRY vs. *PATTON AND WIFE.*

A judgment rendered in Baton-Rouge, by a Spanish tribunal, before the cession, is not a foreign judgment.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellant brought this suit to recover a sum which he claims under a

East'n. District. *May* 1815.

TERRY vs. PATTON AND WIFE.

decree or judgment, rendered in his favor by a competent tribunal exercising jurisdiction over the district of Baton Rouge, whilst under the Spanish government. He recovered in the district court and the defendants appealed.

It is admitted, by the counsel of both parties, that the Spanish record (a copy of which is certified by the parish judge, who became the keeper of the public archives of that district after the change of government) contains all the material facts in the case, except one, which they added, and is, that the seizure or embargo of the two slaves mentioned in the proceedings, was raised by order of the Spanish judge.

This record does not exhibit a very correct and formal course of proceeding, in the Spanish tribunal. However, it shews, 1, that judgment was there rendered in favor of the appellee for the sum of one thousand and three dollars and three cents, against James Profit, executor of David Ross, deceased, the former husband of the appellant Mrs. Patton.

The fact of judgment having been thus rendered, appears from the uncontradicted allegation of the appellee, in his petition to the Spanish governor for the seizure and sale of the goods of the deceased, David Ross; 2, that on this application certain slaves were seized, but

were afterwards delivered up and released by the Spanish governor, as is shewn by the statement of facts.

The judgment of the Spanish tribunal liquidated and fixed the amount due to the plaintiff, and ought so far to be considered as conclusive between the parties, as it is a decision rendered by a competent authority of a place, which has since fallen within our jurisdiction. The grounds on which it was given cannot now be enquired into, not being a foreign judgment. It does not appear that it was appealed from or in any manner suspended or annulled. The ultimate failure of the party to have it executed is not sufficient to destroy its legal effect.

By the death of Profit, the executor, it became necessary to make new parties to the suit, a circumstance which required that the appellee should proceed in the ordinary way for obtaining judgment, as the situation of the parties could not well authorise the extraordinary and summary mode of proceeding immediately by way of execution. No attempt has been made on the part of the appellants to prove payment or satisfaction of the Spanish judgment.

In this view of the subject, there is no error discoverable in the decision of the district court.

East'n. District. *May* 1816.

TERRY vs. PATTON AND WIFE.

It is therefore ordered, adjudged and decreed, that its judgment be affirmed with cost.

Livingston for the plaintiff, *Hennen* for the defendants.

See *post* 310, *Decker's Ex'x.* vs. *Bradford's Heirs.*

WILLIAMS vs. *PEYTAVIN.*

The liability of a carrier does not begin till the goods are delivered him.

APPEAL from the second district.

DERBIGNY, J. delivered the opinion of the court. A verbal contract was entered into between the parties, whereby the defendant and appellant engaged to carry to New-Orleans, in his barge, a quantity of cotton belonging to the plaintiff and appellee. The agreement was that he should take it down immediately on the return of his barge, which was expected in a few days. Thirteen bales of the cotton were laying at the plantation of one Mad. Rose, who had sold them to the plaintiff. This parcel not having been received by the defendant and appellant, and having shortly after been destroyed by the breaking in of the river, the present suit is brought for the recovery of its value.

The substance of the testimony produced, to

shew a breach of the contract by the defendant, is that he did not send his barge to the landing of the vendor of the cotton, nor any written order for its delivery, but employed a person verbally, to go and request the vendor to cart the cotton to the bank of the river—a request which was not complied with.

The general rule, with regard to carriers, is that they are answerable for any damage or loss which may happen thro' their fault to the goods committed to their charge. "If the master, says Abbot, receive goods at the quay or beach or send his boat for them, *his responsibility commences with the receipt.*" After they have been received, should they perish on the shore before they are put on board, the carrier is answerable. *Etiamsi nondum sint res in navem receptæ, sed in litore perierint, quos semel recepit periculum ei pertinere, ff. l. 3. naut. caup.*

The principle is the same in the common law of England, *Strange* 690. To charge the defendant therefore as a carrier, according to the general rule, a delivery to him ought to have been proven; but the contrary being in evidence, if he is still liable for the loss of the cotton, it must be on account of some particular obligation *arising* out of his contract.

He had engaged to ship the cotton immediately

East'n. District. *April* 1816.

WILLIAMS vs. PETTAVIN.

on the return of his barge. Here the plaintiff holds him responsible, because he did not within the time agreed upon, send his barge to the landing of the vendor's plantation, and did not, either in person or by a written message, make application to the vendor to have the cotton removed. It does not appear that he had entered into any obligation to demand, in a formal manner, the delivery of the cotton from the person in whose custody it was: but, from the nature of his contract, he was bound to send some notice to that person, of his coming to take it.

It is by no means clear that if he had failed to give any advice of his coming, and had passed on without calling for the cotton, he would have been answerable for the loss of the cotton, in the care of another person. But it is in evidence, that he sent a message, requesting that the cotton should be carted to the levee, and that his message was not attended to. The circumstance of his not having been at the landing of the vendor, to take the cotton, is of no moment: for, he was not bound to go before he knew that the cotton was brought to the place, or at least that they were carting it there. He was, at the time, at the distance of twenty or twenty-five arpens below the landing, employed in taking on board of his barge other cotton of

the plaintiff. It even appears, from the deposition of one of the witnesses, that the appellant had already made an attempt to go to the landing of Madame Rose, but the passage to it being blocked up by floating timber, his hands had made vain efforts to reach it. It was natural that he should wait till he heard that the cotton was on its way to the levee, before he made any further trial. He certainly has done as much as can be required from a carrier.

It is ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendant with costs.

Duncan for the plaintiff. *Davesac* for the defendant.

ENET vs. *HIS CREDITORS.*

An appeal lies from a decree confirming the nomination of a syndic.

A majority *in amount* of the creditors is necessary for the appointment of a syndic.

Unless all the creditors agree the syndic must be chosen among them.

APPEAL from the fourth district.

DERBIGNY, J. delivered the opinion of the court. This is a case in which some of the creditors of a bankrupt have elected a syndic, in opposition to others, who contend that the election is illegal and void. From the decree confirming the nomination, an appeal is brought up by the opposing creditors.

East'n. District. May 1816.

EXET vs. HIS CREDITORS.

The first question which arises is, Whether this is a decision that could be appealed from?

The jurisdiction of this court is confined by law to the revision of final judgments and decisions. It has been so recognised in the case of *Brooks's Syndics* vs. *Weyman*, 3 *Martin*, 2. But this court has declared at the same time, that what is to be deemed a final decision must depend on the circumstances of each case. This amounts to a recognition of the principle, that an appeal lies from a decree which, though not final in the proceedings, is final as to the consequences, or in other words so far final, as to cause to the party an injury thereafter irreparable: as is expressed in *III. part.* 18, 23, and in the *Recopilacion de las leyes de Castilla* 4, 18, 3.

The decree here appealed from is not a final judgment in the proceedings: for such final judgment must be that which decides upon the rights of all parties concerned, by providing in what order and what proportion the debts shall be paid. We must therefore ascertain, whether this decree be one which causes to the appellants an irreparable injury.

The nomination of syndics, in cases of a cession of goods, vests such syndics with a right to take possession of the estate of the bankrupt,

East'n. District. *May* 1816.

ENET vs. HIS CREDITORS.

to have it sold, to receive the proceeds and distribute them. For the faithful performance of this trust, they give no surety, because they are in fact the attornies of the creditors. Before any definitive judgment can be given in the case, the estate or the proceeds of it are at their entire disposal. If they dissipate or embezzle it, will an appeal from the definitive judgment afford any remedy? Clearly none. A decree then, the consequences of which may be such is certainly one of those decisions, which are considered in law as having the force of a final judgment.

Its correctness ought to be inquired into, while it is time to prevent the mischief. To say that this inquiry shall be made, when the final judgment comes before us, which signifies in other words, when the evil may have become remediless, would amount to a denial of justice.

In this case, it is contended that the nomination of the syndics is void on two grounds: 1, because made by creditors, whose united credits do not amount to a sum equal to what is due to the creditors who opposed the nomination: 2, because the person appointed is not one of the creditors of the estate.

I. On the first point, nothing is more positive than the authority of *Febrero* in his treatise *de*

East'n. District. *May* 1816.

ENET vs. HIS CREDITORS.

Juicios, lib. 3, *cap.* 3, *sect.* 1, *n.* 26, speaking of the nomination of the administrator of the estate, (here named syndic) he says that "it must be made by all the creditors or a majority of them *in amount*" and not in number.

II. On the second, the dispositions of our *Civil Code* 84, *art.* 34, are equally decisive. It is there provided that "when a debtor surrenders his estate for the benefit of his creditors, they may cause to be appointed by the judge a curator, whose duty it shall be to take care of such estate, or they may appoint some one or more *among them*, under the name of syndics or assigns, to have the management of said estate." The appellees contend that this faculty, given by law to the creditors, does not exclude the right, which they have, independently of any law, to choose whom they please to take care of their interest. That may be correct, when applied to a case in which all the creditors join in the nomination: but a nomination by a part must be made agreeably to law to bind those who do not concur in the appointment.

It is ordered, adjudged and decreed that the decree appealed from be avoided, annulled and reversed, and that a mandate issue to the district

judge commanding him to convoke, at such time and place as he may think fit, another meeting of the creditors of Joseph Enet, for the purpose of proceeding to the nomination of a syndic or syndics, according to the provisions of the law.

Moreau for the appellants. *Hiriart* for the appellees.

See *post June Term*, same case.

DECKER'S EX'S. vs. BRADFORD'S HEIRS.

APPEAL from the third district.

A judgment rendered in Baton Rouge, before the cession is not a foreign judgment.

A judgment is sufficiently certain, when the amount recovered clearly appears from the documents.

MARTIN, J. delivered the opinion of the court. This action is brought on a judgment obtained in the tribunal of the governor of Baton Rouge, before the Americans took possession of that part of the country. The defendants resist the claim of the plaintiffs on two grounds.

1. That the judgment must be considered as a foreign one, and the court of this state have the power, and it is their duty, to inquire into the grounds on which it was rendered, and if this court do so, it will appear that the judgment was improperly rendered.

2. That the judgment is null for uncertainty.

I. This court is of opinion that judgments, rendered in this country, before the Americans took

East'n. District. *May* 1810.

DECKER'S EX'S vs. BRADFORD'S HEIRS.

possession of it, cannot be considered as foreign. They vested property, and the treaty of cession provides that the inhabitants of the ceded territory shall be protected in the free enjoyment of their *property*, &c. *art.* 3. Now, to divest the plaintiff, in such a case, of the property, *in action*, which he acquires by the judgment, would be a violation of the protection, which was here stipulated for; the judgment before us had passed *in rem judicatam;* under the former government; its character was fixed, and cannot admit of any alteration under the new.

II. If, however, it be not *certain*, the vice has not been cured by a change in the government.

The plaintiffs sued on an obligation for a specific sum, the price of a tract of land: the defendants were called upon to, and did, acknowledge it as the deed of their ancestor, but pleaded that one of the conditions of it to be performed by the plaintiffs' testator had been broken; and the judgment of the governor is that "the claim of the plaintiffs appearing proved and just, and the allegations of the defendants appearing unfounded, it is just the plaintiffs should recover the sum due." An alcalde is directed to compel the defendants to pay it with costs.

The defendants contend that the judgment being for *a sum due*, without any further specification, is null and void for uncertainty. But here, it is impossible that the sum intended to be awarded should be mistaken. A sum is claimed on an obligation; the obligation being acknowledged by the defendants and the plaintiffs' claim not being contested as to its amount, the sum intended to be awarded in the judgment must be that claimed in the petition, and acknowledged to be due in the acknowledged deed of the defendants' ancestor.

Farther, the judgment is perfectly *legal*. The laws of Spain invalidate judgments which do not express a certain sum, *cantidad cierta, a menos que se remitte a los autos, y en ellos conste. Febrero de Juicio ordinario, n.* 499.

The sum need not be expressed, if the judgment refers to the documents, *autos*, and thereby the amount appears, *de ellos conste.*

Here the judgment begins by informing us that by *the documents, it appears that the sum claimed is due. Apparecciendo por los documentos . . . ser legitimamente Don D. Bradfort deudor de la suma reclamada.* It next declares the opposition of the defendant unfounded, and concludes that it is just he should pay the sum due,

East'n. District. *May* 1816.

DECKER'S EX'S. *vs.* BRADFORD'S HEIRS.

la suma debida, and requires the officer to cause it to be made.

Here is, therefore, a clear reference to the acts from which the sum is said to appear due. In examining the main document, the deed, which is the ground of the action, we find that the sum awarded appears thereby to be due.

The plaintiffs are clearly entitled to the benefit of their judgment, and the decree of the district court is affirmed with costs.

Livingston for the plaintiffs. *Turner* for the defendants. See *Terry* vs. *Patton* & *ux.* 301.

PRAMPIN vs. *ANDRY.*

An order quashing an execution is appealable from.

APPEAL from the court of the parist and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The plaintiff had judgment against the defendant, and execution had issued thereon; six months after, the execution being unsatisfied, he obtained a rule on the plaintiff to shew cause "why the execution should not be quashed," and one week after the parish court gave judgment that the execution be laid aside, staid and quashed.

East'n. District, May 1816.

PRAMPIN vs. ANDRY.

From this decision the plaintiff appealed, and the statement of facts shews, that no evidence was offered except that which results from the record.

The suit originated by a petition grounded on a notarial instrument, by which the defendant undertook to pay nine hundred dollars to the plaintiff, and mortgaged certain property therefor. The prayer of the petition was for judgment against the defendant and provisorily a seizure of the premises. The defendant came in and there was judgment against him. He prayed for a new trial, which after an argument was refused.

The order, decision or decree by which the parish court deprived the plaintiff of the right he had acquired, by the judgment and execution, being one, which, if improperly made, occasions a *grievance irreparable*, is one against which this court ought to relieve, and the case is a proper one for an appeal.

Nothing appearing from the record or statement of facts, which can justify the order complained of, it is ordered, adjudged and decreed that the parish court be directed to order the issuing of an execution to the sheriff of the same tenor and effect as the one staid and quashed,

East'n. District. *May* 1816.

PHAMPIN vs. ANDRY.

and that the appellee pay the costs of the appeal.

Hennen for the plaintiff, *Moreau* for the defendant.

ABAT vs. *DOLIOLLE.*

A statement of facts may consist of the detail of the evidence.

Altho' the supreme court think the inferior court ought to have charged the jury, as the appellant prayed, or granted him a new trial if the whole facts are before them, they will not remind the case.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The plaintiff and appellee complains that the statement of facts, which comes up with the record, in this case, is *irregular*, inasmuch as it contains a detail of the testimony received below, or a statement of every fact, not only proven, but attempted to be so there.

The act which regulates the practice of the court, 1813, *ch.* 12, *sect.* 11, provides that "there shall be no reversal for any *error in fact*, unless it be on a *special verdict*, rendered in a district court, or on a statement of facts, *agreed upon by the parties*, or fixed by the court, if they disagree."

The meaning of the legislature is not easily to be ascertained. How can we reverse a judgment for an *error in fact*, when the facts are found by a special verdict, *agreed upon* by the

East'n. District. May 1816.

ADAM vs. DOUGLAS.

parties, or fixed by the court? The obvious inaccuracy of the expressions made use of by the legislature, in this section, occasioned much confusion on the establishment of this court; and in the third case that came before them, *Brooks's syndic* svs. *Weyman*, 3 *Martin* 13, the counsel with a view, it is believed, of ascertaining the opinion of this court, moved for a *venire*, in order to have the facts tried *de novo*. The motion was overruled and an opinion was expressed that *no re-examination of facts in this court*, was contemplated by the legislature.

On the authority of this decision, the counsel for the appellee in the present case, contends that a re-examination of facts must precede the application of the law, since the facts, upon which we are to pronounce, are neither *found* by a special verdict, *agreed upon* by the parties, nor *fixed* by the court below. The opinion of the court, in the case cited, must be understood to relate to a re-examination of the facts, in the manner in which it was asked, *by a jury*, or by the audition of oral testimony.

Two months after the decision there invoked, in the case of *Lebreton* vs. *Nouchet*, 3 *Martin* 68, the court entered into a very minute examination of the facts shewn in evidence, in the court below, and transmitted with the record—

East'n. District. *May* 1816.

ABAT vs. DORGILLE.

they attended to certain acts of one of the parties—to letters which he had written, and finally pronounced the result of the impressions made on their minds, and declare what is proven on one side, insufficient to counterbalance the weight of the facts which are opposed.

In the month following, they acted on a statement of facts, composed of the depositions of several witnesses, and in the opinion of the court considerable stress is laid on the conclusion which is to be drawn from the particular facts sworn to, in order to fix the one, upon which the question turns. *Duplantier* vs. *St. Pé, id.* 186.

In the first case that was tried in the western district, the decision of the judge *a quo* and the documents accompanying it (being admitted to contain all the facts in the cause) were taken and considered as a statement of facts, the testimony of one of the witnesses commented upon by the court, and an opinion expressed of the weight to which it is entitled to. *Cavelier & al.* vs. *Collins' heirs, id.* 188.

In *Duplantier* vs. *Pigman, id* 244, the court express the result of their examination of the evidence, and conclude that there cannot be any doubt that he, the defendant, is liable to eviction—that the mortgage appears to be unsatisfied,

and that to a very large amount, and set aside a general verdict.

In *Brown* vs. *Kenner & al. id.* 270, the court declare that from the testimony given below, all of which is transmitted, certain facts are to be collected.

Two depositions, with the cross examinations of the witnesses, were sent up and acted upon, in lieu of a statement of facts, in *Villere & al.* vs. *Brognier, id.* 320.

A number of other cases to this effect might be cited, and there are none, except the one first quoted, from which the opposite doctrine might be inferred.

Altho' the practice is now, for the first time, about to be settled, by an express decision, it appears that a statement of the facts, given in evidence in the court below, has universally been admitted in this, whether *agreed upon* by the parties, or fixed by the judge. This construction of the law has been that of counsel and district judges, ever since the establishment of our present judiciary system, throughout every part of the state, and has been contenanced by every judge who sat in this court. The objection which is now made to it has been patiently and maturely considered and we are of opinion that it cannot prevail.

East'n. District. May 1816.

ABAT vs. DOLIOLLE.

The intention of the legislature was to change the *old law*, under which a new trial always took place on appeal. The *evil* was that witnesses and jurors were required in the court above, and when the sessions of the court of appeals were confined to two places for the whole state, the labor and expence of attendance became insupportable. The *remedy* was a provision that the facts should be sent up from the court below with the record. This was to be effected by taking down the testimony of every witness in writing, by sending up an abstract of the evidence or the final result of it. The legislator has left this to the option of the parties, their counsel, or the judge *a quo*. The words *statement of facts* are satisfied if the material facts, those on which the question turns, be set down: and they are equally so if every tittle of testimony be taken down and sent up. Neither is it easy to perceive any greater inconveniency in the latter than in the former mode, sending up the whole record, except that which arises from the labour and expence. We hear of clamours on the supposed violation of the right of trial by jury: but they, who thus declaim, may by little attention to the conduct of the cause, in the inferior court, secure every possible advantage which may result from a trial by jury.

The law has provided, 1805, *ch.* 26, *sect.* 6, that "all facts, intended to be submitted to the jury, shall be drawn up by the party intending to submit them." Now, if care be taken to present naked facts for the decision of the jury, a special finding may easily be obtained. Then no statement of facts will be necessary, the testimony of no witness, no piece of evidence is to be sent up.

If this be neglected by the counsel, and the judge below indulge the parties, by suffering the case to go to the jury without the formal submission of any issue, it is impossible for this court to declare the law, unless the evidence be previously weighed by the parties, their counsel, the judge below, or by this court. In such a case it is desirable that the parties or their counsel should do so. If they cannot concur in a result, and will candidly agree on a detail of all the evidence adduced and submit it to this court, who can complain? Will the judges of this court, could they legally, decline to yield their aid? If the animosity, too often attending litigation, prevent the parties from agreeing either on the details or the final result of the evidence introduced, the law has said a statement must be made by the judge who tried the cause, and this, whether the issue was tried by a jury or other-

East'n. District. May 1816.

ABAT vs. DOLIOLLE.

wise. Here again, if motives of delicacy prompt him to it, or if he judges it safest to transmit a detail of the evidence introduced, nothing appears to us to forbid it. If he deems it best to weigh and decide on the evidence, and send us the result of the impressions which his mind has received, he is at liberty so to do, and in neither case can this court compel or prevent him.

In cases in which the parties do not resort to a jury (and these are by far the most numerous) there can hardly be any doubt, that by constituting this court a court of appeals, the constitution intended that the errors of inferior courts on points of fact, as well as those on points of law, should be corrected by it. In cases in which a jury is called in below and a general verdict is found, whether the evidence be weighed and pronounced upon by this court or by the lower one, it is a court, not the jury, who do so.

We are of opinion, that the practice which has hitherto prevailed, to send the whole evidence as a statement of facts, is not in the least repugnant to the act of the legislature, and that whether it be chosen by the bench, the parties, or their counsel, we are bound to act upon the facts or evidence thus transmitted.

The defendant is sued as indorser of a note,

which it is admitted was duly protested, and regular notice was given: but, the answer sets forth certain facts to avoid or arrest the claim of the plaintiff, viz. that the note in suit was, in the knowledge of the plaintiff, indorsed on the faith and security of a note of $ 6,800, which was deposited with Anthony Abat, the brother of the plaintiff; that the maker of the note in suit has failed, and that the large one, by which the defendant was secured in his indorsement, has been removed out of the reach of the defendant, and is kept out and concealed by persons with whom, it is alleged, the plaintiff colludes and connives: so that, if the defendant pays the note in suit, he will find himself by the act of the plaintiff, his agents, or persons over whom he exercises a control, or with whom he colludes, absolutely prevented and disabled from obtaining any benefit or advantage from the security, in contemplation of which he gave his indorsement.

On these facts, the defendant has built his hope that the court will protect him from the plaintiff's claim: at least so far, as to see that the defendant's money be not put into the plaintiff's hands till the note for $ 6,800 be produced or satisfactorily accounted for.

I. At the trial, in the parish court, the de-

East'n. District
May 1816.

ABAT
vs.
DOMERGUE.

fendant offered in evidence a sketch of the insolvent's bilan, by which it appears, that this note was therein inserted as the property of the insolvent, and Antoine Abat, the plaintiff's brother, with whom it is alleged the plaintiff colludes, in whose hands the said note had been deposited, and who was employed in the discount of the one on which the present suit is brought, caused the entry of the said note to be striken out and erased. This piece of evidence being offered to go to the jury, as circumstantial proof of the allegation of the defendant, was rejected by the parish court, whereupon the defendant took a bill of exceptions.

II. Towards the conclusion of the trial, the defendant's counsel requested the parish judge to charge the jury, that, "if from the evidence, they believed that the defendant's endorsement was guaranteed by the note of $6,800, and the plaintiff was privy thereto, and that it was, in the manner charged, hindered from appearing on the bilan filed, they ought to find for the defendant." The parish judge declining to give such a charge, the defendant's counsel took a bill of exceptions thereon.

III. The jury brought the following verdict. "We, of the jury, find for the plaintiff the sum

mentioned in the petition: but the jury are of opinion, that the note of $6,800 shall be surrendered to the court to cover the note of L. Dussuau, for which it was by him given and signed."

The parish judge thereon gave *judgment for the plaintiff, without paying, however, any regard to the concluding part of the verdict, the same not being warranted by law.* Whereupon the defendant appealed.

He contends, that the parish judge erred, 1. in rejecting the sketch of the insolvent's bilan, 2. in refusing to give the charge prayed for, 3. in entering judgment for the plaintiff while it was his duty to have entered it for the defendant, or at least to have awarded a new trial.

I. The objection made to the opinion in rejecting the sketch of the bilan was considered by us in June last, 3 *Martin*, 659, and we still think, that the defendant did not offer such evidence of a connection between the plaintiff and Antoine Abat, as could authorise the production of the sketch as evidence against the plaintiff.

II. The judge ought to have charged the jury that if the facts alleged were proven, and they concluded that the note for $6,800 was kept out

East'n. District
May 1816.

KEAT
vs.
DOLIOLLE.

of sight by the agency, collusion or connivance of the plaintiff, they might either find for the defendant, or state the fact especially in their verdict—which would have been but a literal modification of what he was required to state to the jury.

III. It is very clear, that the jury took the law to be as the defendant's counsel had suggested it to be, and that they were of opinion, that the facts stated in the answer were sufficiently proven. For, that verdict is literally the judgment which the defendant's counsel insisted ought to have been given.

IV. The judgment of the parish court is therefore directly at variance with the verdict.

It is true, that if the jury find the whole issue and add matter impertinent thereto, the impertinent matter ought to be rejected and judgment given on the other part of the verdict. But, here matter of avoidance was pleaded, and was to be acted upon by the jury. First, they were to find the facts in the petition: they answer, we find for the plaintiff the sum in the petition with interest. From this, the court, by implication, rightly concluded that they found the facts, on which the plaintiff rested his claim, true. They next pass to the examination of the facts

East'n. District. May 1816.

ABAT vs. DOLIOLLE.

alleged in the answer, on which the defendant expects to arrest and suspend the plaintiff's claim, until the note alleged to be withdrawn is returned: the jury thereon answer that the note ought to be surrendered to the court. The facts, alleged in the answer, being by induction as strongly found by the jury, the judge ought to have concluded, that the second or concluding part of the verdict was warranted by law, or that neither the one nor the other were so.

This case is a glaring instance of the difficulties in which courts involve themselves by suffering the looseness of practice which generally prevails. The law, which requires that issues should be made and submitted to the jury, is disregarded; and juries, without any legal clue, endeavour to extricate themselves from the perplexing situation in which they are placed: an important part of their verdict is rejected, as not being warranted by law. In the present case we think that the part of the verdict rejected by the court was warranted by law.

We have carefully examined the record and the statement of facts, with the view of ascertaining what judgment we might properly give. The defendant has insisted on having the facts of his case found by the jury; they appear to

East'n. District. *May* 1816.

ABAT
vs.
DELISLE.

have been of opinion that they are as he has alleged them. Yet, in examining the record and statement of facts, we are not prepared to come to the same result. A jury have legal means of information not equally within the reach of a court. They know the character of the parties and the weight to which the testimony of each witness is entitled. Without any fault on his part, through the error of the judge below, he has been disabled from obtaining the effect of the verdict of the jury in his favor. Yet, however inclined we may be to afford him relief, we cannot avoid the unpleasing task of pronouncing on his case, upon the evidence spread before us. It is not alleged, nothing can justify the belief, that there is any evidence behind which might be favorable to him.

The plaintiff has substantiated his claim: his conscience has been probed, and the result is, that he must recover on the case made out, unless the defendant proves the alleged fraud. In this it appears to us he has not been successful.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be affirmed with costs.

Hennen for the plaintiff, *Smith* for the defendant.

RHENDORFF vs. HIS CREDITORS.

If an insolvent debtor's year's residence expires, after he has been confined thirty days, and he applies for the benefit of the law, within thirty days after the expiration of the year, he cannot be relieved.

RHENDORFF vs. *HIS CREDITORS.*

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The petitioner prayed for the benefit of the "act for the benefit of insolvent debtors in actual custody;" his application was refused on the ground that it was too late, having been made after the expiration of more than thirty days after his confinement. His application admits this, but avers that the year's residence, which is required, in order to entitle a prisoner to relief under this act, did not expire until after the lapse of the first thirty days after his confinement, and he offered evidence that, within thirty days after the year's residence was completed, the application was made.

The court below rejected the evidence, and to its opinion on this point, the bill of exceptions, on which this case comes up, was taken.

We are of opinion that the evidence was properly rejected. If the applicant had stated that, as soon as the year's residence was acquired, he made application, his case might have been apparently, and only apparently better, but he states that within thirty days, after the expiration of the year, he applied. This was not even

East'n. District. May 1816.

RELKDORFF vs. HIS CREDITORS.

doing every thing in his power to comply with the requisites of the law.

If, by his neglect, or by the provisions of the act, he be not able to bring himself within it; it is his misfortune.

It is ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Morse for the petitioner. *Depeyster* for the creditors.

TURNER vs. *RABB.*

If an order for cotton be given, on discharge of a debt, and the creditor delays presenting it thirty three days, the loss of it by fire will be his.

APPEAL from the third district.

This suit was brought on the following due bill, viz: "Due H. Turner, or order $412 18, value received, and for which payment I have given him my order on Canada Cason, at Farrar's gin, for 3435 lbs. baled cotton, which if paid is in full, if not, then this is valid. Nov. 11, 1809. S. Rabb."

Annexed to this was the order for the cotton, on which was written "I certify that this 14th day of December 1809, Mr. H. Turner, by his agent A. D. Wethers presented me with an order for ten bales cotton, which I cannot pay,

owing to the burning of Capt. Farrar's gin, in which said cotton was consumed by fire. Canada Cason."

The answer resisted the plaintiff's claim, on the ground that the order had been detained by the plaintiff for an unreasonable time, before its presentation, during which the cotton was accidentally destroyed.

Glasscock deposed that three or four weeks after Christmas, 1809, he was at Farrar's gin, and heard the defendant say to Canada Cason, that he had drawn on him an order for ten bales of cotton, in favor of the plaintiff, and heard Cason reply that the cotton was ready. There was about 600,000 lbs. of cotton in the seed, in the gin, when it was burned. The defendant had nine bales made up, and the witness lent him one weighing upwards of 300 lbs. He knows nothing of the weight of the nine bales. Three or four weeks after this conversation, the gin was burned.

The statement of facts consisted of the deposition of Glasscock, the note, order for the cotton and the certificate or declaration of Canada Cason the gin-keeper.

Turner for the plaintiff. The note is abso-

East'n. District. *May* 1816.

TURNER vs. RABB.

lute for the debt, and the order operates as a defeasance. In all cases, the person, who expects to avail himself of the defeasance, must shew performance. The order is only an authority to receive the cotton, which, when received, is to operate a payment: but the note is no payment. This is proven by the giving of the note and the order, and by the recital of the order in the note.

The order was presented on the 14th of December, two weeks before Christmas, and the gin was burned before.

Cotton receipts, in the Mississippi territory, the place of the domicil of both parties, and in which the contract was entered into and was to be performed, are negociable, and according to law, when no day of payment is stipulated, are payable in four months from the date. *Dig. Miss. laws* 233. The order in the present case, contains no day of payment; the gin-keeper had therefore four months to pay it in. The plaintiff was not therefore in fault when he presented it thirty-three days after he received it. Glasscock's testimony cannot be depended upon; according to his account, the gin must have been burnt several days after the presentation of the order. It must have been burned on or about Christmas day.

There is no time for presenting a bill of ex-

change payable at sight or so many days after sight. 2 *H. Bl.* 565.

Bradford, for the defendant. Our case is not that of a cotton receipt. It is true that, in the Mississippi territory, when a gin-keeper gives a receipt for cotton delivered him in the seed, without expressing the time when he is to return it baled, the law gives him four months. But here the plaintiff received an order for the delivery of the cotton in bales, which the defendant, according to the testimony, had in the gin, lacking one bale, which he borrowed. From the moment of the delivery of this order, the defendant lost all right on the cotton, all control over it; he could take no measure for its preservation—between him and the plaintiff the property of it passed to the plaintiff—it was really a sale of so much cotton, the price of which was to be applied to the discharge of what the defendant owed to the plaintiff. The plaintiff was vendee, the price was already paid; he was therefore the owner of the cotton—it perished without any fault on the part of the vendor, and the rule is *res perit domino suo*.

The certificate of the gin-keeper, produced by the plaintiff, to throw the loss of the cotton upon the defendant, establishes the burning of the

East'n District. *May* 1816.

TURNER vs. RAND.

gin, prior to the presentation of the order. It shews that the conflagration alone prevented the plaintiff's receipt of the cotton. *Glasscock* swears we had it in the gin: and the plaintiff himself has placed on the record the declaration of the gin-keeper, that, owing to the conflagration, the cotton could not be delivered. The exact date of the order, the time of the delivery of it, does not appear; but it had been delivered, at the date of the note, the 11th of November: how long before, we cannot ascertain. Taking then the position the most favourable for the plaintiff, the application was delayed thirty-three days. For what purpose? The answer necessarily presents itself for the convenience of the plaintiff. Who is then to suffer? He who was the cause of the delay which has occasioned the loss: for the delay is the cause of the loss.

MARTIN, J. delivered the opinion of the court. The plaintiff sues on an instrument by which the defendant acknowledges a sum due to him or his order, and declares, that he has given in payment an order for a quantity of cotton, to be received at a gin in the Mississippi territory, which if paid is in full, otherwise the instrument to be valid for the sum stated.

The order is annexed to the petition with the

instrument. The first is without a date, the other has that of Nov. 11th. 1809.

The defendant alleges that the plaintiff is without a cause of action, because he neglected to present the order for payment, till the cotton was accidently destroyed by fire.

Glasscock, a witness introduced by the defendant, deposed, that the gin, at which the plaintiff was to receive the cotton, was burnt about Christmas 1809: the defendant had then there ten bales of cotton, one of which was lent him by the witness. This last bale weighed 300 lbs.: the witness knew nothing of the weight of the other bales.

On the back of the order is an endorsement of the gin-keeper, stating, the order had been produced to him on the 14th of December, 1809, and was not paid, the cotton having been burnt.

The district court gave judgment for the defendant and the plaintiff appealed.

His counsel shews, that by a law of the Mississippi territory, in which the contract under consideration was made, gin-keepers give receipts for seed cotton brought to their gins, that these receipts are negociable, and when no day of payment or delivery of baled cotton is therein mentioned, they become due four months after date. That in the present case, there being

East'n. District. *May* 1816.

TURNER vs. RADD.

no receipt from the gin-keeper, he was not bound to deliver the bales till four months after delivery of the seed cotton, and these four months had not elapsed, when the cotton was burnt. So that the gin-keeper, by a call on him, could not have been put *in mora*, nor was he compellable to deliver the cotton, therefore the plaintiff was guilty of no neglect, and consequently not liable for the loss.

In looking on the order, we find it to be for *ten bales of my* (the defendant's) *cotton*: and it is in evidence, that the defendant had the quantity of bales in the gin-house. Whether these bales proceeded from seed cotton, sent thither to be ginned—whether he had a receipt without a specific time of delivery—whether that time or the legal one was elapsed—or whether the bales had been purchased from the gin-keeper, or any of his customers, does not appear. The law, therefore, of the Mississippi territory which is cited does not apply to the present case.

The order was *given*, and consequently *received* in *payment*. It must therefore have *prima facie* extinguished the debt, at least suspended it till the happening of the contingency mentioned, viz. the *non-payment* of it.

The defendant's obligation was reduced to

East'n. District. May 1816.

TURNER vs. RADD.

the warranty of the payment; the plaintiff submitted to the obligation of requiring it. If he had immediately applied, there is no doubt that the cotton would have been delivered. Its destruction results from the delay, and this court is only to examine whether the district court erred in determining that a delay of thirty three days was an unreasonable one. The record does not present any circumstance, that may take the present case, out of the general rule. It ought to have been shewn, if such was the case, that the distance of the gin, the inconveniency or difficulty of access thereto, the ordinary mode of doing business there, presented favourable features in the plaintiff's case. This has not been done.

The naked question is, therefore, when one has taken upon himself to receive goods, may he protract the risk of the former owner thirty three days; the judge below has thought that he could not, and it does not appear to us that he erred.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed with costs.

East'n District. *May* 1816.

LAMOTHE'S EX'R vs. DUFOUR & AL.

LAMOTHE'S EX'R *vs.* DUFOUR & AL.

If the testator extends the time for settling his estate, beyond the year, if necessary, and the executor does not begin a suit till thirteen years after, the delay will not be justified by the extension of the time.

APPEAL from the fourth district.

MATHEWS, J. delivered the opinion of the court. The plaintiff and appellant brought suit, as executor of Nicholas Lamothe, late of the city of New-Orleans, against the appellees to recover from them certain property claimed by him, in right of his testator. The action was commenced in 1812, before the superior court of the territory of Orleans, and remained to be tried, under the constitution and laws of the state, by the court from which this appeal is taken.

In the course of the trial in the court below, the plaintiff offered in evidence to support his right to sue, in his said capacity of executor, an authentic copy of the last will and testament of Lamothe, and also a judicial proceeding of governor Grandpre, dated at Baton Rouge, September 1799, establishing the death of Lamothe, with an inventory and other proceedings relating to the estate of the testator, at the instance of the plaintiff, his executor. The district court rejected the evidence, as insufficient to maintain the plaintiff's right to sue for and recover the property thus claimed by him, and ordered the suit to be dismissed. To the opinion of the

court, inrejecting the evidence, a bill of exceptions was regularly taken by his counsel, and on it alone the cause comes up to this court.

The case is submitted to us, without an argument, and it becomes our duty to determine the legal effects of the will in question, as to the powers therein granted to the executor. In the fourth section, the testator declares that he did not possess any other goods, than those which he held in partnership with his wife, and about which he was in litigation with certain persons, who had acquired the possession of them, in consequence of a testamentary disposition of his wife, and that the suit had for its principal end the annulling of his wife's testament, and establishing their matrimonial contract, which contained a clause of reciprocal donation: in the event of his death, he requires his executor to prosecute said suit to its end. In the fifth section he appoints the plaintiff and appellant his sole executor, and gives him power to settle all the affairs of his estate, and for this purpose extends the term of it, should it be necessary, beyond the year, within which, according to law, an executor is bound to complete the administration of his testator's estate.

The fourth section of the will limits the power of the executor to the prosecution and con-

East'n. District. *May* 1816.

LAMOTHE'S EX'R vs. DUFOUR & AL.

clusion of a suit, which the testator had commenced in his life time, and certainly ought not to be extended to the present action, as it clearly appears not to have been commenced before the year 1812, about thirteen years after the testator's death. It is therefore evident that the plaintiff and appellant derives no authority to commence and prosecute the present action under this part of the will.

To establish the legality and justice of the appellant's pretentions to institute and carry on this suit, we have been referred to Febrero's treatise on contracts and wills, in which it is laid down that executors "*tienen de termino para complir su encargo el que prefine el testador, ya sea mayor or menor que el legal: y se ninguno les senala, deben evacuar lo mas breve que pueden. Se non pueden concluir lo con tanta brevidad, les concede el derecho un ano contado desde el dia de su muerte.*" *vol* 1. *ch. n.* 25. The executors have the time, to complete their functions, which the testator has fixed to them, be it greater or less than the legal period: and if he has fixed none, they ought to complete them as early as possible, and if they cannot do it in so short a time, the law allows them one year from the death of the testator.

According to this authority, perhaps, the sixth

section of the will would have operated so as to extend the authority of the executor beyond the legal period of one year, for the purpose of carrying into effect the dispositions of the will, if he had commenced the execution of it in all its parts, immediately on the death of his testator. This he has not done: but on the contrary, he has delayed for the space of nearly thirteen years, to begin that which the law required him to complete within one. We are of opinion, that the power to commence and prosecute the present action was not continued and supported by this latter section of the will.

It is therefore ordered adjudged and decreed, that the judgment be affirmed with costs.

Livingston for the plaintiff, *Mazureau* for the defendant.

RION vs. *RION'S SYNDICS.*

A married woman has a privilege for her dotal property only.

APPEAL from the court of the parish and city of New-Orleans.

DERBIGNY, J. delivered the opinion of the court. The husband of the plaintiff and appellant having made a surrender of his property to his creditors, she demands to be paid her matrimonial rights by privilege.

East'n. District. *May* 1816.

RION vs. RION'S SYNDICS.

In support of her claim, she produces her marriage contract, on the face of which it does appear, that she brought nothing at the time of her marriage, but gave power to her husband to collect any sum which might be, or become, due to her. It is in evidence, that in consequence of that authorisation, he received some years after a sum of money, which she now claims.

For her title to a privilege, the appellant relies principally on the custom of Bordeaux, where the marriage took place. There it is shewn married women have for the reinbursement of their dowry, *dot*, not only a mortgage on the real estate of their husbands, but a privilege upon all their property, whether real or personal. Thus, if the plaintiff had succeeded to shew that the rights which she claims are dotal, it would be worth inquiring how far the law of the place where the marriage was contracted, would affect the rights of creditors in this country, on personal property acquired here; and also whether the laws which prevailed here, when the plaintiff arrived in this country, and by which married women enjoyed a similar privilege on the estate of their husbands, would be applicable to her case. But, the rights of the plaintiff are evidently not of the dotal kind; the expressions of her marriage contract repel

interpretation in favor of her claim. The parties there explicitly declare that they possess nothing for the present to bring into marriage: *n'avoir rien a se constituer pour le present.*

The subsequent clause by which she authorises her husband to collect her dues, even if there were not such negative expressions in the preceding, could never be construed as intended for a constitution of dowry. "In our district," says Salviat, on the jurisprudence of Bordeaux, "every thing is considered as dotal which is given to a woman, in consideration of her marriage, or to bear the charges of it, even when the constitution is not express, and neither the words *constitution* or *dot* are used. It is, however, needful that there should exist a contract, evidently shewing that a *dot* was given or promised: for in this district, no implied one is known. If there be no marriage contract, none of the property belonging to the wife is dotal, and if there be a contract, no property is dotal, except that which is thereby expressly destined to be dotal." *Jurisprudence du parlement de Bordeaux, verbo Dot.*

The rights of the plaintiff not being dotal, she can claim nothing more against the estate of her husband than a mortgage upon his real property. The parish judge, in recognising

East'n. District. May 1816.

RIOS vs. RIOS'S HEIRS.

that mortgage and giving judgment in her favour for the amount claimed, has done her ample justice.

It is ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Livingston for the plaintiff, *Seghers* for the defendant.

See same case, *February Term* 1817.

DENIS vs. *CORDEVIELLA.*

No appeal lies from the order of a court of probates, granting three months to the curator of a vacant estate to account, and directing that on his failure, his bond be put in suit.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellee is an attorney, appointed by the court of probates of the parish of Orleans, under the 4th section of the act concerning successions *ab intestato*, enacted in February 1809. The object of his appointment is to compel sundry curators of vacant estates, and among others the appellant to render an account of their administration, and to pay the amount in their hands into the treasury of the State.

In execution of that trust, the plaintiff and appellee has proceeded in the court of probates to

East'n District. May 1816.

Denis vs. Condevielle.

cite the appellant to render his account. The account has been rendered, and the judge of that court, by virtue of the powers to him given by the act above mentioned, has granted to the appellant a delay of six months to settle his account finally; providing at the same time, that if such a settlement should not take place before the expiration of that delay, the defendant's and appellant's bond should be put in suit.

From that decree, the defendant and appellant prayed an appeal to the district court, and the district court having dismissed his appeal, on the ground, that the decree complained of was not such a judgment as could be appealed from he has brought his case before us.

We can feel no hesitation in saying, that this was not a case for an appeal from the court of probates to the district court, nor from the district court to this. The only proceeding in the court of probates, from which the law has given an appeal, is the granting of letters of administration, now letters of curatorship. We do not think that any of its other acts is subject to be revised in the form of an appeal. The party dissatisfied with them has his remedy in a court of law.

In the present case, the appellant has no cause of complaint till his bond is put in suit. His

East'n. District. *May* 1816.

DENIS vs. CORBEVILLE.

present appeal is irregular and without object.

It is therefore ordered, adjudged and decreed, that the judgment of the district court, dismissing the appeal from the court of probates, be affirmed with costs.

The plaintiff *in propriâ personâ*. *Livingston* for the defendant.

PLYDER vs. *NATHAN & AL.*

Notice of the protest of a bill of exchange must be given within a reasonable time. What is a reasonable time is a question of fact.

APPEAL from the court of the first district.

DERBIGNY, J. delivered the opinion of the court. The plaintiff and appellee is the holder of a bill of exchange, drawn here on Boston, to the order of the defendants and appellants who are partners in trade, and is endorsed by them. The bill was not accepted, and on its becoming payable was duly protested for non-payment.

The only question raised in this case is, whether due notice of non-acceptance, and protest for non-payment, was given to the defendants and appellants.

The facts are chiefly these: the bill was presented for acceptance on the 29th of November 1814, and a letter bearing date of the 2d of De-

cember following, informing Charles Pinder, the person who had remitted it, that it was not accepted, was received here by Andrew Milne, the agent of Pinder, on the 25th of the same month. On the next day, Milne informed one of the defendants of the non-acceptance of the bill. On the last day of the month, (December) the bill was protested for non-payment. The bill and protest were sent in a letter, dated New-York, January 7th, 1815, and in the usual course of the mail came to the hands of Milne, who received it on the evening of the 14th of February following, while stationed on military duty, at camp Villeré, and sent it to the city on the next day, to be communicated to the defendants. On the ensuing morning, it was presented to one of them, from whom payment was at the same time demanded.

From these facts, it is evident that the holder of this bill was guilty of no latches, in giving notice to the endorsers, either of the non-acceptance or non-payment. That of the non-acceptance was given within twenty seven days from the time of the refusal, as short a time as can be allowed between Boston and New-Orleans. The protest for non-acceptance was inclosed in a letter, bearing date seven days posterior to it: but that letter was written from

East'n. District. *May* 1816.

PINDAR vs. NATHAN & AL.

New-York, and the necessary time to come from Boston to New-York must be deducted from these seven days; it came here in the usual course of the mail and was communicated as soon as could be under existing circumstances.

In the United States there does not and cannot exist any general rule, as to the time within which notice of protest ought to be given to the endorser of a bill of exchange. It must be given within a reasonable time, and what that reasonable time ought to be, is a question of fact which must depend upon the circumstances of each case. 1 *Dallas*, 254, 270, 2; *id.* 158, 194.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Depeyster for the plaintiff. *Duncan* for the appellants.

BEARD vs. *POYDRAS.*

APPEAL from the fourth district.

'Although the party introduces a will emancipating her, she may give parol evidence of her being born, reputed, and acknowledged free.—

This action was instituted for the recovery of a tract of land, in the possession of the defendant, devised to the plaintiff by Christopher Beard, her reputed father.

East'n District. *May* 1816.

BEARD *vs.* POYDRAS.

The defendant, in his answer, claimed title to the premises under a deed from the heirs of B. Farrar, who, on his motion, were made parties to the suit as warrantors.

An amended answer was afterwards filed, stating, that at the date of C. Beard's will, and at his death, the plaintiff was a slave of B. Farrar, and therefore could not take any property under the will.

The *code noir* of Louis XV, was for a short time only in force in Louisiana.

At the trial, the plaintiff offered several witnesses, to prove, that she was born free, was so reputed, and had been acknowledged as such by Farrar before Beard's death. The district judge refused to receive their testimony, on the ground, that the plaintiff having introduced Farrar's will, and read the sixth clause of it, by which he bequeaths her freedom to her, had thereby destroyed the presumption of her free-birth: and that, if she had been emancipated at any subsequent period, her act of emancipation ought to be produced or accounted for. To the opinion of the court, in this respect, the plaintiff took a bill of exceptions.

There was finally judgment for her, and the defendant having failed to introduce any evidence against the warrantors, his suit against them was dismissed.

East'n. District. *May* 1816.

BEARD vs. POYDRAS.

The statement of facts, made by the district judge, is in the following words:

On the trial of this suit, the following facts appeared in evidence:

A certain Christopher Beard, made his last will and testament, on the 6th of March, 1789, in which is the following clause: "and further my will is, that my negroes shall be put on my land on Fausse Riviere to make tobacco, indigo, or whatever shall appear to my said executors to be most advantageous, and that, in the course of two or three years, if my friends should apply, my executors, if they think proper, may divide the estate between them, and a mulatto wench hereafter mentioned, but not until they know and are assured that they are my real heirs. It is also my will that some of my executors, or some other person whom they may appoint, may carry on my plantation, and that a little mulatto girl, named Venus, now on the plantation of B. Farrar, esq. receive a good education, and an equal dividend of my estate."

B. Farrar, E. Gallaudet and Robert Jones were appointed executors.

Beard died in 1789, and his will was regularly proved, but was accompanied by a decree or order as follows: "New-Orleans, May 26, 1809: Don Eistevan Miro, Brigadier-general,

&c. Having seen the acts, I declare that C. Beard ought to be declared, and he is hereby declared, to have died in part intestate, not having named any heir, for which reason his father or mother ought to inherit, and in case of there being neither father nor mother, then his nearest relation ought to inherit. I declare him also to have died partly testate, having named testamentary executors." The decree was signed by Miro, the then governor of Louisiana, with the approbation of the auditor.

Beard had fifteen negroes on the plantation of B. Farrar. Before as well after his death, Farrar had possession of his land, and the tract claimed by the plaintiff is now in the possession of the defendant, and is the same as is alleged to have been bought from Farrar's heirs by the defendant.

It was granted by the Spanish government to Beard in 1789.

In 1790, Farrar died, having made his will, the 6th clause or section of which is as follows: "I desire my executors to make free a mulatto girl, called Venus, a daughter of my negro woman Nancy, supposed to be a bastard child of C. Beard, deceased. I do give and bequeath to the said girl Venus six negroes, men and women, that is three of each, to be delivered when

East'n District. *May* 1816.

BEARD vs. POYDRAS.

she arrives at the age of eighteen; but, if she dies before that age, and leaves no lawful issue, then the said negroes to return to my estate, as part thereof to all intents and purposes. And this further condition I also make, that is to say, that the above freedom and donation are in consideration of all and every claim whatever she may have to any estate left by said Beard; and I require my executors to take a proper discharge therefore, at the time of the delivery of said six negroes. I desire that said Venus be properly educated in the christian religion, and taught to read and write, and when of proper age, that she may be put to a mantua-maker and learn the business; and my executors to see that she is well used, and all this at the expense of my estate."

Venus, the plaintiff, was born about the year 1785, of the negro woman Nancy, a slave of B. Farrar, and reputed to be the daughter of C. Beard, tho' no proof was adduced of her having been acknowledged as such by him.

The land in question would rent for about 180 dollars a year.

An order was given by the plaintiff, on the executors of Farrar, in April 1801, in favour of one Mulzach, for a part of the legacy left her by Farrar, and produced at the trial, accepted

by the executors, as an evidence of her having commuted her rights, under the will of Beard, for the said legacy: but it was not proven that the said order had been paid.

The plaintiff is not named in the inventory of the slaves of Farrar. She has been considered as free since his death, and has lived as a free woman for upwards of ten years.

Livingston for the plaintiff. This case ought to be remanded, if the judgment is not affirmed, for the district judge erred in rejecting the witnesses, which were offered on the part of the plaintiff, to shew that she was born free. She is not a negro, but a person of mixed blood; the presumption is therefore that she is born free, and it was lawful for her, in aid of this legal presumption, to offer parol evidence of her free birth.

But, we contend that the judgment ought to be affirmed. It is in vain that it it is contended that the plaintiff had no other right to her freedom, but that which she derived from the acceptance of the legacy, entire and undivided, and from the performance of the condition, imposed on her by the testator. Freedom is so much favoured in law, that a conditional grant of it is always deemed absolute, and that the conditions, which testators add to the grant of

East'n. District. *May* 1816.

BRAND vs. POYDRAS.

freedom, are considered as if they had not been written.

If it be written: *when Titius shall arrive at the age of thirty, I wish that Stichus be free, and that my heir give him such a tract of land*, and Titius dies, before he reaches his thirtieth year, Stichus shall be free, but he shall not have the land; for it is only in favor of liberty that a fiction is admitted, by which, after Titius' death, a period of time is supposed to remain, at the expiration of which, the bequest is to have its effect, but as to the devise of the land, the condition, under which it was made, is deemed to have failed. *ff* 40, 4, 16.

Freedom cannot be given for a limited time, *eod. tit.* 33, as for ten years, and the commentator adds—What, if it be so given? The time will be rejected, as a senseless addition.

If it be written: let Stichus be free for ten years, the restriction is vain. *Additio temporis supervacua est, eod. tit.* 34.

The Emperors to Missenius Frontonus. Freedom being granted in the testament of a soldier, in the following words, *I will or order that* my slave *Stephen be free.* The slave will enjoy his freedom, as soon as the succession is accepted. Likewise the following expressions added, *provided, nevertheless, that he remain*

with my heir, till &c.: but if he refuse to stay, he shall be retained as a slave, shall not have the effect of revoking the freedom; and this will be the case also in the testaments of other persons, *eod. tit* 52.

East'n. District. *May* 1816.

BEARD *vs.* POYDRAS.

When freedom is given under a condition, if it be not in the power of the slave to perform it, altho' he be not prevented by the heir, he ought to have his freedom, *eod. tit.* 55.

Moreau for the defendant. The district court did not err, and the witnesses were properly rejected. It is in evidence, from the will of Farrar, introduced by the plaintiff, that she was his slave, was born of a negro woman, his property, and that he bequeathed her freedom to her upon certain conditions: she claims it under it. It would be therefore, a departure in the pleadings, to allege and seek to prove that she was born free. How can she say that she was born free and emancipated?

If she was not born free, no parol evidence of her emancipation can be received. By the 50th article of the *Code Noir*, enacted by Louis XV. in 1724, and especially put in force by Governor O'Reilly, in 1769, it is expressly provided that emancipation can only be granted by a written instrument: an act *inter vivos* or *causâ mortis.*

East'n. District. *May* 1816.

BRAND vs. POYDRAS.

We contend that she is what is in the Roman law called a *statuliber*, and not a free woman. On this we are at issue.

A little closer examination of the title of the digest *de manumissis testamento*, commented upon by the plaintiff's counsel, would have convinced him that the general principle of the Roman law, in respect to conditional enfranchisements, is quite the reverse of what he argues it to be, and the laws which he has cited, are exceptions only to the general rule, which are not susceptible of extention.

Freedom may be given absolutely or conditionally, or to be enjoyed at a future day. When the slave is manumitted absolutely, he becomes free as soon as the succession is accepted; but if either a condition or time be added to the manumission, the condition must be performed or the time must elapse, before the freedom is enjoyed, *ff* 40, 4, 23, § 1, 3 *Pothier's Pand. Just.* 55. 14 *Rodriguez's dig.* 187.

According to the Spanish law, all legacies may be absolute or conditional, or at a future day, *Part.* 6, 9, 31. 1 *Febrero contratos*, ch. 1, *n* 46.

In legacies under a condition or at future day, the condition must be performed, or the day

must arrive before they have any effect. *Part.* 6, 9, 21. *Febrero id. n.* 47 48.

East'n. District. *May* 1816.

BEARD *vs.* POYDRAS.

Slaves manumitted by will, under a condition, or on a future day, were called at Rome *statu liberi* until they acquired their freedom. *ff* 40, 8, 1. 14, *Rod. dig.* 287.

STATULIBER. By this word was designated the slave manumitted, under a condition, or at a future epoch; it came from *statuta libertas, conditio statutæ libertatis.* 1. 81 *ff de legatis* 2 *Dict. du Dig. n.* 1667.

Till the condition was performed or the day arrived, the *statuliber* was considered as a slave. No body is ignorant that the *statuliber* is in the interim the slave of the heir. *ff* 40, 7, 9. 14 *Rod. Dig.* 315.

Children born from a woman *statuliber*, are the slaves of the heir. 40, 7, 16. 14 *Rod. Dig.* 321, 322.

We read in the books of Gaius Cassius, that what is acquired by a *statuliber*, before the performance of the condition, added to the manumission, does not enter into the *peculium* which is bequeathed, unless the legacy be made for the time when he should be free. Yet it is to be observed that the *peculium* being susceptible of increase and decrease, the increase ought to make part of the legacy, *provided the heir has not*

East'n. District. May 1816.

BEARD vs. POYDRAS.

taken the peculium from the slave. *ff* 40, 7, 28, 14 *Rod. Dig.* 331.

The *statuliber* differs but little from any other slave, as to the actions which grow out of a tort, the gestion of an affair, or a contract, *ff* 40, 7, 29. 14 *Rod. Dig.* 331.

It is then correct to say that the plaintiff is as yet but a *statuliber*, and that she cannot lay any pretention to her freedom, till she performs the condition added by the testator to her manumission. After this, and not before, she will be entitled to her freedom, and to the legacy left her by Farrar, if she has not yet received it.

The *statuliber* can only become free by performing the condition added to his manumission, if it be possible, and no one prevents him from performing it. *ff* 40, 7, 3. 14 *Rod. Dig.* 300.

As to the possibilty of performing the condition, the Roman law speaks thus: he is not considered as *statuliber*, whose freedom is protracted to so distant a day, that he cannot live till then; or who is manumitted under a condition very difficult or almost impossible to be performed, so that he cannot hope to be free. As if I manumit my slave, on condition that he pays my heir one thousand times a given sum, or if I manumit him when he dies: for freedom thus given, according to Julianus, is without ef-

fect, because the testator had not really the intention of giving it. *ff* 40, 7, 4, § 1. 14 *Rod. Dig.* 308.

As to the slave being hindered from performing the condition, there are two kinds of hinderances which cause the condition to be considered as performed—the hinderance which proceeds from the heir, that which results from obstacles which it is not in the power of the *statuliber* to overcome.

If the heir prevents the performance of the condition, as for example, if he refuses to receive the sum which the *statuliber* tenders him, according to the will of the testator, it is beyond a doubt that the slave is free, because he is prevented by the heir from performing the condition. *ff* 40, 7, 3.

Every hinderance proceeding from the heir does not, however, cause the condition to be considered as performed with regard to the *statuliber*. It is requisite, in order that it may have this effect, that the object of the heir should have been to prevent him to obtain his freedom. *ff* 40, 7, 38. Thus, if the heir forbids the *statuliber* to work for any other person but him, desiring that he should serve him exclusively, in such a case, and the like, it will not be holden that he thereby hinders him to

East'n. District. May 1816.

BEARD vs. POYDRAS.

perform the condition imposed by the testator, that the slave should pay a given sum to the heir, because the slave is nevertheless bound to labour for the heir. 14 *Rod. Dig.* 338.

With regard to any personal hinderance, it is admitted, that if the *statuliber* does every thing in his power to perform the condition, and he cannot succeed, he is deemed to have performed it, and he becomes free.

When freedom is given under a condition, the decisions are, that if the slave is not in fault in not performing the condition, although he be not hindered by the heir, he shall have his freedom. *ff* 40, 4, 55. *id.* 40.

There is a similar disposition in the partidas. If a testator has ordered that his slave be emancipated, on condition that he perform certain services to another person, if the slave does every thing in his power, and be hindered by another, the bequest shall take effect, and the slave shall be manumitted, in the same manner as if he had performed the services. The reason is that the law has ever been favorable to liberty. We say that if the testator makes a legacy, under a condition which it is in the power of the legatee, and of some other individual to perform, if the condition be not performed, through the fault of the legatee, the legacy shall not be valid. *Part.* 6, 9, 22.

This is a valuable authority, and is decisive in the present case. For, it cannot be pretended that the heirs of Farrar put any obstacle to the performance of the condition imposed on the plaintiff by the testator, nor that she has been hindered from performing it.

The *partida* 6, 9, 34, contains the same disposition as the *ff* 40, 4, 16, cited by the plaintiff's counsel. Where freedom is bequeathed to take place on a given epoch, the law admits certain fictions in favour of freedom; but this cannot be extended to the case of freedom, granted on condition of doing or not doing some thing, to give a thing, to renounce a right: because positive laws decide, that the *statuliber* can only acquire his freedom by the performance of the condition, unless it be not in his power to perform it.

The plaintiff's counsel has cited *ff* 40, 4, 33 and 34. These authorities are not at all applicable to the present case. They relate to freedom bequeathed for a time. The plaintiff is not manumitted so. Freedom may be bequeathed to be enjoyed after a future day: *ff* 40, 4, 41, but it cannot be bequeathed for a time, so that the manumitted slave, at its expiration, may be held in slavery again, because he who was once free cannot be a slave again.

East'n. District. *May* 1816.

Beard vs. Foxbras.

Lastly, it is contended that conditions, added to the bequest of freedom, are to be considered as nullities, and *f* 40, 4, 52 § 55 are relied on. How can this assertion be reconciled with the laws of this and the 7th title, which we have cited, which declare that the *statuliber* can only cease to be a slave, by the performance of the conditions, under which freedom has been granted to him?

It is known how rigorous the Romans were in regard to the forms of their actions, clauses and stipulations. If in a clause of a will, freedom was granted absolutely, and in another it was sought to be revoked, the latter was considered as not written. This was the case in the will of Missenius. Freedom was deemed to have been bequeathed absolutely, since the law cited states that the slave will acquire his freedom, as soon as the succession is accepted, which is, as has been shewn, the proper character of freedom bequeathed absolutely. The second clause was, according to our reasoning, considered less as the grant of freedom, than as a revocatory clause on a certain contingency: such a revocation could not be admitted, as it militated against the principle that he who was once free can never be reduced to slavery. It is thus that Rodriguez understands this part

of the digest. *Por la clausula primera de la ley, se concede la liberdad al siervo; la qual no se revoca por lo clausula posterior.* 14 *Rod. Dig.* 218.

So, in a donation *inter vivos*, which ought to be irrevocable from its nature, every clause by which a donor would reserve to himself the right of disposing freely of the thing given, or to resume it, would be null, while he might legally impose conditions on the donee, without performing which, he could not have the benefit of the donation. 2 *Pothier Don. inter vivos, part 7, art. 3.*

DERBIGNY, J. delivered the opinion of the court.* The plaintiff and appellee, a mulatto woman, supposed to be the bastard child of Christopher Beard, deceased, claims a tract of land, now in the possession of the defendant and appellant, which she says was devised to her by her reputed father.

According to the statement of facts, which comes up with the record, it appears that the plaintiff was the slave of one Benjamin Farrar, at the time of Beard's death: but she alleges that, if certain witnesses whom she offered had been heard, she might have proven that she was

* MARTIN, J. did not join in this opinion, having been of counsel in the case.

East'n. District. *May* 1816.

BEARD vs. POYDRAS.

born free, was so reputed and had been acknowledged as such by Farrar, before the death of Beard. That evidence having been rejected, his counsel filed a bill of exceptions, upon which it is necessary to pronounce before we proceed further.

From the matter set forth in the bill of exceptions, it appears that before any attempt had been made on the part of the defendant to prove that she is a slave, she introduced in evidence the will of Benjamin Farrar, in which he orders his executors to emancipate her, and afterwards the testimony, which was rejected, in order to shew that she was born free and had been acknowledged as such by Farrar, in the life time of Beard. The district judge thought that by producing the will of Farrar, she had destroyed the presumption of her free birth, and had shewn that she relied on a title to freedom by emancipation, and being of opinion that freedom by emancipation could not be proven by witnesses, he rejected the witnesses proffered.

In both these positions we think that he was mistaken.

If the will of Farrar, produced by the plaintiff, contained nothing else with regard to her, than an expression of his intention, that she should be enfranchised, there would have been

East'n. District. May 1816.

Beard vs. Poydras.

some reason to suppose that she relied on it, as her title to freedom, and to consider her as stopped from attempting to prove that she was born free, or that she had been manumitted prior to that will; tho' it must be confessed this would have been to carry very far the doctrine of estoppel. But the sixth section of the will of Farrar, which the plaintiff read in evidence, contains other particulars concerning her. He there stipulated that her freedom, and the legacy which he leaves her, are in consideration of all and every claim whatever, which she may have to any estate left by Beard, and requires that, upon her arriving to the age of eighteen years, his executors shall take from her a proper discharge therefrom. Here then is another matter mentioned than the emancipation. The plaintiff well may have produced this document, to shew that Benjamin Farrar was himself aware that she had some claim upon the estate of Beard, which Farrar had appropriated to his own use. The mere reading of that clause, therefore, is no evidence that the plaintiff intended to use it as a title to freedom, and ought by no means to have operated as a barrier against the introduction of any proof, which might tend either to shew her free birth or her emancipation anterior to that will.

East'n. District. *May* 1816.

BEARD vs. POYDRAS.

The plaintiff has offered to evince two facts, first that she was born free, secondly that she was reputed free and acknowleged as such by Farrar, in the life time of Beard. On the admission of any proof of the first fact, the district judge was of opinion that she had herself destroyed the presumption of her free birth, and could not be permitted to establish it by evidence. But, we have already shewn that the introduction of the will of Farrar cannot be interpreted with that rigour. The plaintiff then could produce testimony that she was born free.

As to the other fact, viz. that she was acknowleged free by Farrar, in the life time of Beard, it is said, that as this must mean that she was then emancipated by him, no oral evidence could be admitted in support of that allegation, because emancipation must be proven by writing. It is not denied that, by the laws of Spain, slaves could be emancipated verbally, in presence of witnesses: but, it is said, that at the time referred to by the plaintiff, the French law, called the *code noir*, according to which none but written acts of emancipation were deemed valid, was in force in this country. To establish this, a proclamation is produced, issued by Don Alessandro de O'Reilly, of the 27th of August, 1769, whereby it is continued

in force. How far the Spanish officer, who took possession of Louisiana, was authorised to maintain the former laws or introduce the laws of Spain, is a subject on which vain inquiries have often been made here. It is probable he did not deposit among the archives of the province any copy of his instructions, or that, if he did, it has disappeared before the country was delivered to the government of the United States. We are therefore left to take it for granted that he did not act without authorisation. Admitting then that he had a discretionary power to preserve such of the existing laws as should be deemed fit, it appears that he thought proper on the 27th of August, 1769, that is to say, about a week after he had taken possession, to declare that the French *code noir* should continue in force. But that this was a measure resorted to on the spur of the moment, in the midst of the storm which then agitated the country, is evident from his subsequent conduct. We see him three months after, when tranquillity was restored, and when he could give the necessary attention to the business of legislation, publishing in the French language an extract from the whole body of the Spanish law, with references to the books in which they are contained, purporting to be intended for an elementary in-

East'n. District. May 1816.

BEARD vs. POYERAS.

struction to the inhabitants of the province; meanwhile the knowledge of the Spanish language should diffuse itself and enable them to read the laws in their original idiom. This publication, followed from that moment by an uninterrupted observance of the Spanish law, has been received as an introduction of the Spanish code in all its parts, and must be considered as having repealed the laws formerly prevailing in Louisiana, whether they had continued in force by the tacit or express consent of government. The observation made by the counsel of the appellant that the French *code noir*, ordered by O'Reilly to continue in force, could co-exist with the Spanish laws afterwards published, because it contains certain regulations for which the Spanish laws have made no provision, is probably correct. When a law is not absolutely and generally repealed, such of its provisions as are not repugnant with the subsequent laws, do not cease to have effect. On the present question, was there no disposition in the laws of Spain concerning the enfranchisement of slaves, it might be just to pretend that the French *code noir* ought to be resorted to, but as the reverse is the case we must refuse to consult it.

The witnesses, offered by the plaintiff, ought therefore to have been heard, even upon the fact

of emancipation, supposing the testimony tendered such as the law 1, *tit.* 22, *part.* 4, does admit. Upon this point, it is true that the plaintiff has not been as explicit as it was her duty to have been: she ought to have shewn her readiness to prove such emancipation as is valid by that law, that is to say, an enfranchisement before five witnesses. The manner in which she tendered her proof, did not shew that, but rather raised a suspicion that she was not able to prove so much. Yet, as it did not exclude all probability that she may evince what the law requires, she ought to have been permitted to introduce her witnesses.

The plaintiff, notwithstanding the rejection of that evidence, had judgment in her favour in the inferior court, and did we agree with the district judge on the merits of the case, it would be unnecessary to send it back. But, being of opinion that as the case now stands, she ought not to recover, we are obliged to remand it.

It is adjudged, ordered and decreed, that the judgment of the district court be reversed, both as to the principal demand and as to the warranty, and that the case be remanded to the district court, with instructions to the judge to admit any legal evidence, which the plaintiff

East'n. District. *May* 1816.

BLAND vs. POYDRAS.

may offer in support of the allegations contained in her bill of exceptions.

RUST vs. *RANDOLPH.*

An appeal lies from a court of probates to the district court, and from thence to the supreme court, on the appointment of a curator to a vacant estate.

In such a case the court of probates ought to permit the opposite party to shew that the applicant is not domiciliated in the state and possesses no property in it—that the other claimant was an old friend of the deceased, &c. is a larger creditor, and a person of property and standing.

The district court ought to try the case *de novo*.

APPEAL from the court of the first district.

MATHEWS J. delivered the opinion of the court. This is a suit in which the right to the curatorship of the estate of Solomon Sterne, deceased, is claimed by both parties. It appears that the estate is *ab intestato*, and also such as is known to our laws by the denomination of a *vacant estate*, claimed by no person, as heir, or under any title. For its administration therefore, a curator ought to be regularly appointed.

The case comes before us on an appeal from the district court, to which an appeal was taken from the judge of probates of the parish of New-Orleans—the same party, the defendant, being appellant in both instances.

It is contended, on the part of the plaintiff and appellee, that this is such a case in which the district court had no jurisdiction, and to this and a bill of exceptions was taken to the opinion of that court, in sustaining the appeal—that this is not a case in which an appeal lies to this

court; lastly that the judgment of the district court, affirming that of the court of probates, is correct.

I. We are of opinion that the right of appeal to the district court from the court of probates, is clearly given by the act defining the jurisdiction of the court of the parish and city of New-Orleans, and that the district court was correct in taking jurisdiction of the cause, as it appears to be one of those in which an appeal was authorised by law from the court of probates to the late superior court.

II. It being admitted by the parties that the estate of the intestate exceeds the value of three hundred dollars, according to a just and rational construction of the constitution and laws from which this court derives its judicial powers, we do not doubt our right of entertaining jurisdiction of the present case.

III. The correctness of the judgment of the district court, in affirming that of the court of probates, must be tested by an examination of the judge's conduct in the course of the trial of the cause, as brought before us on the bill of exceptions, taken by the counsel of the defendant and appellant to the opinion by him given, in

East'n. District. May 1816.

RUST vs. RANDOLPH.

refusing to hear a witness offered to prove the following facts: 1. that the plaintiff had no domicil in the city, and had not resided therein three months prior to his application for letters of curatorship: 2. that he possessed no property within the parish: 3. that the defendant and appellant was an old and intimate friend of the deceased, who shortly before had expressed his wish that he should have the charge of his property, after his death: 4. that the defendant was a larger creditor than the plaintiff: 5. that he was the most discreet person to have been appointed curator, was a man of considerable property and standing, and his views, in applying for letters of curatorship, were to preserve the property for the heirs.

To determine whether the district court erred in rejecting the testimony thus offered, it is necessary previously to ascertain the nature and effect of an appeal from a court of probates to a district court, and also the legal weight and consequence which a proof of these facts ought to have on the respective rights of the parties.

An appeal from any of the late inferior tribunals to the territorial superior court, was always considered by the judges of that court, and we believe correctly, as bringing the case up for the purpose of trial *de novo*, in which the court was

bound to give judgment on a full hearing of all legal testimony in the case, as if in the first instance; and according to the act above cited, the right of appeal from a probate to a district court, is placed on the same footing and must be governed by the same principles, which prevailed in similar instances before the late superior court.

If all or any of the facts, which the defendant and appellant offered to prove, might and ought to have changed the opinion of the district court with regard to the judgment of the court of probates, the judge erred in rejecting the testimony.

The causes which disqualify persons from being appointed tutors to minors, and which are applicable to curators *ad bona*, are expressed in the civil code 66, *art.* 47, and it is true, as stated by the counsel of the plaintiff and appellee, that none of the disqualifications there detailed, are attempted to be proven against his client.

It is admitted that this is the case of a vacant estate, in which a curator ought to be appointed, and, as there is more than one applicant for the office, the judge of probates was bound to exercise his discretion in chusing between them. But in judicial proceedings, the discretion of a judge is legal, not arbitrary. We have before stated that

East'n. District. *May* 1816.

RUST vs. RANDOLPH.

the district court was bound to try the cause *de novo*, and consequently ought to have exercised a legal discretion, in deciding on the claims of the parties, after a full developement of all facts retating to them.

It is laid down in the civil code 14, *art.* 12, that in selecting curators to a vacant estate, the relations of the deceased are to be preferred to creditors, creditors to strangers and persons not interested in the succession, provided that the persons thus to be preferred, have the necessary qualifications.

We are clear that interest in the estate is the reason of the rule, by which the preference is established: and this reason, when a contest arises among creditors, if their qualifications are in all other respects equal, will extend the right to a preference to the creditor who holds the largest claim. We are therefore of opinion that the district court erred in refusing to admit the testimony offered by the defendant and appellant, by which he offered to prove himself a larger creditor than the plaintiff and appellee.

Altho' perhaps the circumstance of a person not being domiciliated in the state, would not exclude him from the office of curator *ab intestato*, claiming as a relation or creditors against

strangers or persons wholly uninterested in the succession, yet where two parties are contending for a preference, whose pretentions are in other respects nearly equal, it would be nothing more than an exercise of sound discretion in the judge, to prefer the citizen of the state who possesses property which is tacitly mortgaged for the faithful performance of his duties as curator, to strangers not possessing this additional qualification.

The intimacy which the defendant and appellant offered to prove to have subsisted between him and the deceased, and also the wish of the latter that he should in case of his death have the charge of his property, are circumstances, which alone would not even balance the pretentions of a *bona fide* creditor, but which combined, as they are in the present case, with other matters, more immediately affecting the rights of the parties, might have some weight in the decision of the cause, and therefore may be received in evidence, without any violation of its rules.

It is ordered that the judgment of the district court be annulled, avoided and reversed, and that the cause be there remanded, for a new trial, with directions to the judge to admit the defendant and appellant to the proof of the facts

East'n. District. *May* 1816.

RUST vs. RANDOLPH.

stated in his bill of exceptions, by any legal testimony in his power.

Livingston for the plaintiff, *Ellery & Smith* for the defendant.

THOMAS & AL. vs. *ELKINS.*

A debt of one of the partners cannot be set off against a demand of the firm.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The plaintiffs and appellants claim $1192 92, the amount of a quantity of goods, purchased by the defendant from their firm: the account, which is annexed to the petition, is made part of the statement of facts.

The defendant opposes to the plaintiffs' claim, an account against the firm, by which it appears, that he is a creditor of the firm for $93, 71. This account, annexed to the answer, is also made a part of the statement of facts.

The two principal items, in the defendant's account, the refusal to admit which occasioned the present suit, are a sum of $900 and one $300, charged as paid to the plaintiffs on the 14th of December, 1813. These payments, it is alleged, were effected by the delivery of two checks of

the defendant, to one of the plaintiffs, at a gaming table. The receipt of these two sums by one of the partners is not denied: but it is contended they were a loan to him, on his private account, for which the firm is not responsible.

The defendant insists that these two sums were a payment to the firm: that a payment to one of the individuals of a firm discharges the partnership debt, on which it was made—that the present one is not invalidated by the *place* in which it was effected, nor by any *use* made by the partner who received it.

The case was tried in the parish court of New-Orleans, where a jury found a verdict for the defendant. The plaintiffs prayed for a new trial, but the court refused it, on the ground that the payment was a correct one, and the plaintiffs are bound to allow it. From the judgment of the parish court, the plaintiffs brought the present appeal.

We are of opinion that the judgment is an erroneous one: the sums in dispute were improperly allowed as a payment.

From the defendant's own shewing, in the account annexed to the answer, the two checks

East'n. District. *May* 1816.

THOMAS & AL. vs. ELKINS.

were handed on the 14th of December, 1813, at a time when, it appears by the same account, there was nothing due from the defendant to the plaintiffs; and from the plaintiffs' account, $6 70 cents only appear to be due. The goods charged appear to have been purchased, for the most part on the 22d of the same month, so that the amount of the checks, delivered eight days before, was improperly considered as a *payment* of them. A payment is in its *nature*, though not in its *essence*, POSTERIOR to the debt.

It remains for us to enquire, whether we can consider the proceeds of the checks, in such a light, as to admit them in *compensation* of the debt. It clearly appears that the money was loaned: now, a loan to one of a firm does not bind the firm to repay, unless the money loaned be for the use of the firm. Nothing shews this to be the case here. The *place*, in which the loan was made, gives rise to a strong presumption, that its object was the sole accommodation of the one of the plaintiffs who received it. The debt must be viewed as his private debt. Now, it is clear that a *private* cannot be set off against a *joint* debt. *Smith* vs. *Duncan & al.* 1 *Martin*, 25.

Independently of these two sums, that of $ 480 was also paid after the creation of the

debt, resulting from the purchase of goods, in the same manner, viz. by a check handed at the gaming-table to the same partner: $400 of which appear to have been returned. If this transaction stood aloof from the other, we might incline to allow the $80, as a *payment*. But the transaction is so much akin to the former, that it must take its character from it. The defendant had before, at the same place, lent money to one of the partners, on his private account: now the subsequent supply afforded, was, in all its circumstances so similar, that it partakes too much of the nature of the former to be distinguished from it.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed, and that the plaintiffs do recover from the defendant the sum of eleven hundred and ninety-two dollars and ninety-two cents, with interest, at the rate of five per cent per year, from the date of the judicial demand, with costs.

Porter and *Depeyster* for the plaintiffs.
Grymes for the defendant.

East'n. District. *May* 1816.

JOHNSON vs. BOON'S HEIRS.

The heir cannot be sued until he accepts the inheritance.

Property of the estate, cannot be proceeded against while there is neither heir nor curator.

JOHNSON vs. *BOON'S HEIRS.*

APPEAL from the third district.

MATHEWS, J. delivered the opinion of the court. This suit was instituted by the appellant to recover from the defendants, as heir of James Boon, deceased, debts of his estate. The claim is opposed on the ground that nothing was inherited by the defendants and appellants from James Boon.

The principal facts necessary to a correct decision, as they appear from the evidence and proceedings transmitted, are as follows. The appellants and defendants are the legitimate issue of the marriage of James Boon and Eunice his wife, which was contracted in North Carolina. At the time, she possessed in her own right, or afterwards acquired from her father or brother during the coverture, a female slave, named Jenny, who, with her increase, is now in the possession of the defendants. Boon, the father, had brought these slaves, with his family, from North Carolina to Georgia and Florida. At the time of his arrival in the latter place, it was under the Spanish government, and it continued

so, long afterwards; he always exercised ownership over the slaves, altho' he frequently declared that the property of them was not in himself, but in his children, who inherited them from their mother. In the year 1809, Courtland Smith (the husband of one of Boon's daughters, and who is joined with her, as a defendant in the present suit) was appointed curator to Boon's children, by a competent authority, and as such obtained possession of the slaves, (Boon being still living) claiming them for the minors, as their inheritance from their mother.

According to the provisions of our law, heirs, who accept an inheritance, are bound to pay the debts of the ancestor to the extent of their own property, if they take the estate without the benefit of an inventory: but, if the estate be legally inventoried, then only to the amount of the inheritance. To make the heir responsible for the debts of his ancestor, an acceptance of the inheritance is necessary, and it may be express or tacit. A succession is accepted expressly, when the heir assumes the quality of such, in some authentic or private instrument, or in some judicial proceeding. It is accepted tacitly, when some act is done from which the intention of being heir must necessarily be supposed, *Civil Code*

East'n. District, May, 1816.

Johnson vs. Boon's heirs.

162, *art.* 77, and in this respect the Spanish law accords with our code. It is useless to enter into any minute detail of the acts, which the law would construe into a tacit acceptance of a succession. None such appear to have been done by the appellants. They claim and pretend to hold the slaves, who form the main subject of dispute in the present case, on a right independent, separate and distinct from that of their ancestor, Boon. It is true that in the statement of facts, it is admitted that one of the witnesses deposed, that a bed, the property of the father, was taken by one of the children, without specifying which of them; a circumstance so vaguely related, as to be insufficient to fix on the appellants such an intermedling with the inheritance of their ancestor, as ought to burthen them with all the inconveniences and losses, which ought to result from a simple acceptation of it. We are of opinion that no person, as heir, can be considered liable to the payment of the debts of the ancestor, without accepting the inheritance. The appellants, from any thing that appears in the present case, have not accepted the succession of Boon, their father, and therefore ought not to be compelled to pay his debts; for altho' the property they possess, which, if it really belonged to him, in his life

time, ought to be subjected to the discharge of his engagements, yet, until it be represented by an heir or curator, no judgment can be regularly rendered against it.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed with costs; but, without prejudice to the plaintiff and appellee, in any future proceeding, which he may legally carry on against the estate of the said Boon.

Turner for the plaintiff. *Robinson* for the defendants.